SUPREME COURT, U.S.
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No. 09-394

In the Supreme Court of the United States

SAUDI AMERICAN BANK,

Petitioner,

v.

SWE&C LIQUIDATING TRUST, successor-in-interest to STONE & WEBSTER ENGINEERING CORP.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF IN OPPOSITION

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December 30, 2009

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The SWE&C Liquidating Trustee is the court-appointed trustee of the SWE&C Liquidating Trust ("Trust"). The Trust is not a corporation. However, among other creditors, shareholders of the formerly publicly traded Stone & Webster, Incorporated, are indirect beneficiaries of the Trust through claims held by the Consolidated SWINC Estate.

No other party listed as a Respondent in Petitioner's case caption participated in the relevant motion proceedings or appeals in the lower courts.

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STATUTES INVOLVED

Title 11, United States Code

§ 1102. Creditor's and equity security holders' committees

(a) (1) Except as provided in paragraph (3), as soon as practicable after the order for relief under chapter 11 of this title, the United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate.

(2) On request of a party in interest, the court may order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity security holders. The United States trustee shall appoint any such committee.

(3) On request of a party in interest in a case in which the debtor is a small business debtor and for cause, the court may order that a committee of creditors not be appointed.

(4) On request of a party in interest and after notice and a hearing, the court may order the United States trustee to change the membership of a committee appointed under this subsection, if the court determines that the change is necessary to ensure adequate representation of creditors or equity security holders. The court may order the United States trustee to increase the number of members of

a committee to include a creditor that is a small business concern (as described in section 3(a)(1) of the Small Business Act [15 USC § 632(a)(1)]), if the court determines that the creditor holds claims (of the kind represented by the committee) the aggregate amount of which, in comparison to the annual gross revenue of that creditor, is disproportionately large.

§ 1103. Powers and duties of committees

(c) A committee appointed under section 1102 of this title [11 USC § 1102] may –

(1) consult with the trustee or debtor in possession concerning the administration of the case;

(2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(3) participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;

(4) request the appointment of a trustee or examiner under section 1104 of this title [11 USC § 1104]; and

(5) perform such other services as are in the interest of those represented.

INTRODUCTION

If this were the time to resolve a split among three circuit courts about the right of official committees in bankruptcy cases to intervene in adversary proceedings, this is not the case to accomplish that task. Petitioner Saudi American Bank has seized on that split to create the appearance of an issue worthy of certiorari – but Petitioner has advanced no reason why it, as an individual creditor, should claim the same rights as official committees to intervene in adversary proceedings, a conclusion that no circuit court has yet advanced.

Not only are the facts of this case the wrong facts to resolve the split, the split does not even present itself in the underlying case. The only way that this Court can consider the split is by deciding: (1) that the Third Circuit did not follow its own alleged "rule" that differs from the Fifth Circuit's "rule"; (2) that the Third Circuit should have followed its own "rule"; and (3) that if the Third Circuit had followed that "rule," the Third Circuit's holding would be contrary to the Fifth Circuit "rule." But the "rules" arise under facts that diverge too sharply from the facts of this case to allow anything but a theoretical discussion of the circuit split. Certiorari is not appropriate in this case.

STATEMENT OF THE CASE

Petitioner Saudi American Bank had long since resolved its own claim against any debtor in the bankruptcy case when Petitioner attempted to intervene in an adversary proceeding pending in the United States Bankruptcy Court for the District of Delaware, one month after hearing about a possible settlement in the proceeding. As Petitioner implicitly concedes, it was motivated solely to hijack a settlement that seemed to have been reached between a debtor in the bankruptcy case, Stone & Webster Engineering Corporation ("SWEC"), and Saudi Arabian Oil Company ("Aramco"). Petitioner did not claim to have any evidence, experience, or knowledge to help prosecute or defend SWEC's claims. Petitioner's sole justification for intervening was its claim to have a perfected security interest in proceeds of any settlement.

Two years later in 2004, the initial proposed settlement was history and Respondent, the SWE&C Liquidating Trust ("Trust"), succeeded to SWEC's interests to resolve all remaining claims against SWEC and to prosecute SWEC's claims against third parties for the benefit of SWEC's creditors. The Trust assumed control of the adversary proceeding against Aramco. When the bankruptcy court sought an update on the case, counsel for the Trust announced in court that the Trust intended to file an amended complaint, and advised that Aramco intended to pursue its long-dormant motion to withdraw the reference. The bankruptcy court, however, ordered mediation.

When Petitioner learned in 2006 that the Trust and Aramco had agreed to terms of a new tentative settlement following mediation and long, difficult negotiations, Petitioner demanded that the bankruptcy court hear Petitioner's motion to intervene filed four years earlier.

The bankruptcy court's decision[1] establishes why intervention was inappropriate: Documents attached to and referenced in the complaint-in-intervention, and even documents and declarations submitted to support intervention, did not show that Petitioner had perfected a security interest that could attach to any settlement – facts and conclusions reiterated by the bankruptcy court in a later decision. *See SWE&C Liquidating Trust v. Saudi Arabian Oil Co. (In re Stone & Webster, Incorporated)*, 373 B.R. 353, 364 (Bankr. D. Del. 2007) ("At the hearing on SAMBA's intervention motion, SAMBA's counsel did not attempt to validate the assignment under Saudi law, or any other law. Thus, I conclude again that SAMBA has not proved that it has a perfected security interest in the contract proceeds.").

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[1] Though this Court's rules required Petitioner to provide "[a]n appendix containing . . . the opinions, orders, findings of fact, and conclusions of law, whether written *or orally given and transcribed*" (Sup. Ct. R. 14(i) (emphasis added)), Petitioner inexplicably omitted the bankruptcy court's detailed analysis at the hearing on Petitioner's motion to intervene. (*See* Respondent's Appendix (Transcript of Proceedings, April 25, 2006).) Petitioner included only the bankruptcy court's order resulting from that decision. (*See* Petition, Appendix D at 14a.)

Petitioner's failure to present authority or evidence at any stage of the proceedings that it perfected a security interest under any applicable law doomed all of Petitioner's intervention theories. *See* 7C Chas. Alan Wright, *et al.*, *Federal Practice and Procedure* § 1914 at 523 (3d ed. 2007) (instructing that a proposed complaint-in-intervention "must state a good claim for relief"). Petitioner argued in response only that the bankruptcy court had to accept Petitioner's conclusory allegation that it had a perfected security interest – an argument that this Court seemingly foreclosed when it held that courts should not accept conclusory legal allegations where the facts do not support the allegations. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2008) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.").

The Third Circuit was no more impressed by Petitioner's claim of a perfected security interest, but affirmed on the basis that even a perfected interest in litigation proceeds does not justify intervention. (*See* Petition, Appendix A at 4a ("*Even granting a charitable interpretation to the assignment on which SAMBA relies to justify its intervention*, this Court agrees with the District Court and the Bankruptcy Court before it that having a claim to proceeds of collateral does not entitle a party to intervene." (emphasis added)).) Nevertheless, Petitioner argues that it is entitled to intervene in the action between the Trust and Aramco even if SAMBA cannot demonstrate a cognizable claim in the litigation.

REASONS FOR DENYING THE PETITION

Petitioner argues that the Third Circuit was wrong to find that an interest in proceeds of litigation is insufficient in itself to justify intervention. Petitioner ignores the bankruptcy court's findings that Petitioner failed to prove a perfected interest "under Saudi, or any other law." *SWE&C Liquidating Trust*, 373 B.R. at 364. Pushing aside these grounds for finding its case for intervention to be deficient, Petitioner argues for certiorari to resolve "an important question of federal law on which the circuit courts are split." (Petition at 10.) The circuit split is illusory on the facts of Petitioner's case, however. Even on facts that are far more compelling than Petitioner's case, the history of the issue does not show it to be an important question of federal law.

A. No Circuit Split Exists On The Issue That Petitioner Wants This Court To Decide: An Individual Creditor's Unconditional Right To Intervene In Adversary Proceedings.

Petitioner's theory relies upon a broad reading of Bankruptcy Code § 1109(b):

> A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

11 U.S.C. § 1109(b).[2]

Petitioner argues that the right "to appear and be heard" entitles any listed "party in interest" to intervene in any adversary proceeding without showing any protectable interest in the proceeding. However, the circuit cases that Petitioner cites for its theory limit their holdings to the narrow context of intervention by official committees, appointed by the United States Trustee, to represent the interest of a specific constituency in the bankruptcy case. *See, e.g.*, 11 U.S.C. § 1102(a) (requiring United States Trustee to appoint committees); 11 U.S.C. § 1103(c) (listing powers and duties of committees, including the performance of "such . . . services as are in the interest of those represented").

The Second and Third Circuits have not extended their holdings beyond committees, and both circuits explicitly justify the holdings by the unique role that committees play in a Chapter 11 case:

> Section 1109(b) is an important monitoring tool at the disposal of the creditors' committee. Intervention under that section appears to be appropriate to the extent it will: (1) minimize the need for extensive judicial oversight, (2) speed the debtor's successful reorganization, and (3) allow the creditors' committee to exert enough leverage

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[2] This section applies only to so-called reorganization cases under Chapter 11 of the Bankruptcy Code, and not to liquidation cases under Chapter 7. *See* 11 U.S.C. § 1109(b) (limiting application "to a case under this chapter").

> on the debtor-in-possession so that the debtor-in-possession does not use its extensive flexibility and discretion in a Chapter 11 reorganization to compromise the creditors' interests. In short, interests of efficiency and fair play underlie § 1109(b), and the driving force behind the *Marin* decision [*Official Unsecured Creditors' Comm. v. Michaels (In re Marin Motor Oil, Inc.)*, 689 F.2d 445 (3d Cir. 1982))] was the belief that allowing intervention into adversary proceedings would best serve those interests.

Term Loan Holder Comm. v. Ozer Group, L.L.C. (In re Caldor Corp.), 303 F.3d 161, 175-76 (2d Cir. 2002) (quoting *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1240 (3d Cir. 1994)). The cases may discuss "creditors" in their broad strokes, but the Second and Third Circuit justify intervention by the responsibility of committees to police a case for the benefit of their constituency. Thus, Petitioner's case is a poor choice to decide if committees have an unconditional right to intervene.

On an individual creditor's unconditional right to intervene, an issue not yet addressed by any circuit court in a precedential opinion, the question is far from ripe for review by this Court. Given the Third Circuit's rejection of Petitioner's arguments, even when Petitioner argued that *Phar-Mor* and *Marin* bound the Third Circuit, the Third Circuit clearly did not see either case as binding precedent on the narrow issue in Petitioner's case.

No less so in the Second Circuit, "the scope of the unconditional intervention right of a party in interest as enunciated by . . . *Caldor*' remains unclear." *Smart World Techs., Inc. v. Juno Online Svcs., Inc. (In re Smart World Techs., LLC)*, 423 F.3d 166, 181 (2d Cir. 2005) (quoting *Iridium India Telecom Ltd. V. Motorola, Inc. (In re Iridium Operating, LLC)*, 329 B.R. 403, 406 (S.D.N.Y. 2005)); *see also In re Iridium India Telecom*, 329 B.R. at 406 ("[T]his Court need not address the question of whether such right extends to a situation in which the proposed intervenor does not seek to assert claims or defenses in the underlying litigation.").

Given the lack of any opinion by any other circuit court on Petitioner's narrow issue, no circuit split currently exists on the issue of a *creditor's* right to intervene.[3]

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[3] Petitioner cites three cases for the proposition that "other Courts of Appeals . . . have indicated in dicta that they agree with the Fifth Circuit's conclusion" in *Fuel Oil Supply & Terminaling v. Gulf Oil Corp.*, 762 F.2d 1283, 1287 (5th Cir. 1985). (Petition at 14.) However, two of the three cases are Chapter 7 cases where Bankruptcy Code § 1109 is unambiguously inapplicable. *See Richman v. First Woman's Bank (In re Richman)*, 104 F.3d 654, 658 (4th Cir. 1997) (considering *Fuel Oil Supply*'s reasoning persuasive on the issue of intervention in a Chapter 7 case); *Kowal v. Malkemus (In re Thompson)*, 965 F.2d 1136, 1142 n.8 (1st Cir. 1992) (holding that a creditor was not entitled to intervene-of-right in a Chapter 7 case; comparing the holding of *Fuel Oil Supply* with a Southern District of New York case that rejected *Fuel Oil Supply's* analysis). The sole Chapter 11 case involves a purchaser of the debtor's property, and not one of the listed

B. The Dearth Of Circuit Cases On The Issue Of A *Committee's* Right To Intervene Does Not Validate Petitioner's Claim That A *Creditor's* Right To Intervene Is An Important Question Of Federal Law.

Belying the alleged importance of the question, only three circuits have issued published or precedential opinions in twenty-eight years on the issue of a *committee's* unconditional right to intervene. (*See* Petition at 14.) No published or precedential case has considered the extension of such a doctrine to creditors, and even the Third Circuit did not consider the issue to be significant enough to designate its opinion in Petitioner's case as precedential. *Cf.* Internal Operating Procedures, 3d Cir., 5.7 ("The court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing.").

Perhaps more importantly, whether or not a *committee* has an unconditional right to intervene, rather than a right to intervene as of right or grace, may rarely be significant. Though the Fifth Circuit agreed with the district court that the creditors'

"parties in interest" in Bankruptcy Code § 1109. *See Vermejo Park Corp. v. Kaiser Coal Corp. (In re Kaiser Steel Corp.)*, 998 F.2d 783, 790 (10th Cir. 1993) (finding that purchaser's contractual rights did not bestow a "significantly protectable interest" in an adversary proceeding). The cited cases do not illustrate a circuit split on any issue.

committee in *Fuel Oil Supply* had no unconditional right to intervene, the circuit still reversed and remanded for the district court to make "findings of fact or conclusions of law" on the committee's right to intervene "as of right . . . or by permission . . . ." *Fuel Oil Supply*, 762 F.2d at 1287-88. The trail goes cold at that point. The record does not reveal whether or not the committee ultimately won the right to intervene. But given the broad standing bestowed on committees because of their role in a bankruptcy case, the differing approaches may make little practical difference. Thus, even on the issue of a committee's right to intervene, the record is too undeveloped to know if the Fifth Circuit approach makes a real-world difference.

Petitioner's case, not involving a committee, would make review by this Court nothing more than a speculative exercise. Even on the issue of a committee's right to intervene, the issue will benefit from much more percolation in the lower courts before making it ripe for review by this Court.

CONCLUSION

This case is inappropriate for certiorari for a multiplicity of reasons. Most significantly, the circuit split that Petitioner relies upon – whether official committees in bankruptcy cases have an unfettered right to intervene in adversary proceedings – is inapplicable to the facts of Petitioner's case. Even if Petitioner's case were up to the task, the paucity of appellate cases provides a

weak record on which to determine what, if any, impact the two approaches to intervention have on the ability of committees to perform their statutory function in bankruptcy cases.

To the extent that Petitioner asks this Court to revisit the denial of its motion to intervene on any other basis, Petitioner asks this Court to substitute its judgment for the judgments of three lower courts, including the bankruptcy court that examined Petitioner's conclusory allegations and found them lacking on Petitioner's facts. If the circuit split needs the attention of this Court, the Trust respectfully suggests that this is not the case and this is not the time. The Trust prays that the Court deny the Petition.

Respectfully submitted,

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RESPONDENT'S APPENDIX

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	
STONE & WEBSTER, INC., *et al.*,	.	Case No. 00-2142(PJW)
	.	
Debtors.	.	Jointly Administered
	.	
STONE & WEBSTER, INCORPORATED, and STONE & WEBSTER ENGINEERING CORP., *et al.*,	.	Adv. No. 02-3963(PJW)
	.	
	.	April 25, 2006
	.	1:30 p.m.
	.	(Wilmington)
Plaintiff,	.	
v.	.	
	.	
SAUDI ARABIAN OIL COMPANY,	.	
	.	
Defendant.	.	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PETER J. WALSH
UNITED STATES BANKRUPTCY COURT JUDGE

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

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THE COURT: Because as I look at these documents, I don't know anything about Saudi Arabian banking law, but under U.S. law, which I assume is not applicable here, I doubt if you have an assignment. And let me go through the documents. Looking first at Exhibit 1 to your motion, this is captioned Assignment of Contract Proceeds, I guess the first thing I would note is that it's dated the 22nd of January, 1995. You said the Loan was in January of '98. But more importantly, that document, quote, "Assignment of Contract Proceeds" recites the assignor hereby assigns to the bank all the proceeds of the contract. Further down on that column it says, The assignor shall immediately notify all payors under the contract of this assignment in such form as may be required by payor, or if no specific form is required, by letter in substantially the following form. And then there's a form letter that says, We hereby advise you that we have executed an assignment of proceeds in favor of Saudi Arabian, Saudi American Bank. But that's not the letter that was sent, and I'm now looking at Exhibit 2, which is a September 21, 1994, quote, "Specific Payment Instruction Letter", close quote. And it reads, quote, "This letter" – and this is a letter from the borrower to, to the Saudi Arabian Oil Company – quote, "This letter requests and authorizes you to pay Saudi American Bank, Floor (phonetic) branch, P.O. Box 842, Alchobar (phonetic)

with a zip code, Saudi Arabia, for credit to our account any and all compensation due from you under contract number 65004." It then goes on to say, and I quote, "We shall mark all our invoices presented to you pay to Saudi American Bank, Floor Branch, P. O. Box" etcetera "for account of Bugshan, S & W Company Limited." Close quote. That doesn't sound like an assignment to me. It sounds like a direction as to what account the proceeds should be paid, and it identifies account of the party that contracted with the Saudi Arabian Oil Company. Isn't that what it says? Let me go on. In Exhibit no. 4, which is a May 11, 2002 letter from the bank to the oil company, it references an assignment of all payments, and it says, We write to remind Saudi Aramco that BS&W by letter dated September 21, 1994, paren, (the, quote, "Specific Payment Instruction Letter", close quote) a copy of which is attached, requested and authorized, etcetera. And in Exhibit 5, the response from the oil company to the bank is to confirm the assignment and authorization contained in the subject specific payment instruction letter which is not a letter suggesting an assignment. And your response is?